IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1386

COUNTRY-WIDE INSURANCE COMPANY,

Appellant,

against

THOMAS A. HARNETT, Superintendent of Insurance of the State of New York,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

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Appellee, pursuant to Rule 16 of the Rules of this Court, moves to dismiss or affirm on the grounds that the questions raised on this appeal are so insubstantial as not to warrant argument, and the decision below is so obviously correct as to warrant no further review.

Statement of the Case

This action was brought under 28 U.S.C. §§ 1331 and 1343 by appellant, a New York insurer, for a declaration of unconstitutionality and an injunction with respect to two features of New York's No-Fault Act (N.Y. Insur.

Law Art. 18, §§ 670 *et seq.*, as added by L. 1973, c. 13, effective Feb. 1, 1974). In unanimously dismissing the amended complaint, the three-judge District Court expressed the view (J.S. 22a) that these particular facets had not been passed upon or authoritatively reviewed by the New York courts, including the State's highest court in previously upholding the constitutionality of the Act itself in *Montgomery* v. *Daniels,* 38 NY 2d 41, 340 NE 2d 444, 378 N.Y.S.2d 1 (1975).*

The holding below was predicated on the law, without need of resolving any possible issues of fact. Nevertheless, we feel bound to take exception to some, at least, of the plethora of misleading statistics and assumptions of fact and law set forth in much of appellant's statement of the case.

Thus, for example, appellant claims that through the exercise of a claimant's option to compel arbitration (N.Y. Insur. L. § 675[2]), "the insurer is absolutely prohibited for all time from obtaining a judicial determination on the merits as to every issue" (J.S. 6).

New York's arbitration statute, Civil Practice Law and Rules Art. 75, provides four grounds for vacating awards on the application of a participant whose rights were prejudiced.** Once the award has been vacated, "the court may

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*No appeal to this Court was sought to be taken in *Montgomery,* as was unsuccessfully attempted with respect to Connecticut's substantially similar no-fault law found constitutional in *Gentile* v. *Altermatt,* 169 Conn. 267, 363 A2d 1 (1975), *app. dism.* 423 U.S. 1041. We believe the holdings in *Montgomery* and *Gentile* are dispositive of appellant's contentions in this case.

**"The award shall be vacated . . . if the court finds that the rights of that party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that

(footnote continued on the following page)

order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator . . ." CPLR § 7511(d).

As noted below (J.S. 25a), this statutory protection has been broadened, with respect to *compulsory* arbitration, by case law holding that CPLR § 7511(b),

> "in authorizing review of whether the arbitrator has exceeded his power, by necessary logical extension and without distortion of its literal terms includes review in the case of compulsory arbitration (but only in such case) of whether the award is supported by evidence or other basis in reason, as may be appropriate and appearing in the record." *Mt. St. Mary's Hospital* v. *Catherwood,* 26 N Y 2d 493, 508, 260 NE 2d 508, 516-17, 311 N.Y.S.2d 863, 875 (1970). See also *Caso* v. *Coffey,* 41 N Y 2d 153, 359 NE2d 683 (1976).

Appellant asserts that "if the insurer could take the first party benefit dispute into a trial court," rather than go to arbitration, there might be a different type of "judicial recourse" (J.S. 7). While this may be literally true, it raises no constitutional question, for it does not imply that there was not a "reasonable basis" for the Legislature's decision to permit first party benefit claims, newly created by the Act, to be referred to a forum other than the courts. As was said in *Hardware Dealers Fire Ins. Co.* v. *Glidden,* 284 U.S. 151, 158 (1931):

> ". . . the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The Fourteenth Amendment neither implies that all trials must be by jury, nor

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(footnote continued from preceding page)

a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection." CPLR § 7511(b)(1).

> guarantees any particular form or method of state procedure . . . [A] state may choose the remedy best adapted, . . . provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard."

The three-judge court pointed out that *Hardware Dealers, supra,* a case "directly presenting a due process analysis of compulsory arbitration of insurance claims . . . clearly disposes of [appellant's] contentions concerning arbitration" (J.S. 24a). Indeed, appellant does not even argue that arbitration denies it reasonable notice or opportunity to be heard.

Appellant complains of having been admonished by the New York County Supreme Court to "keep away from the courts with complaints about claimants' elections to compel arbitration" (J.S. 7). Yet, as shown by appellant's quoted excerpt (*ibid.*), the court merely chided the insurer for instituting "proceedings of this nature *without sound basis*" (emphasis supplied). As we have already noted (*ante,* p. 3), the State's highest court has indicated on at least two occasions the substantial degree of review available with respect to compulsory arbitration.

In detailing its asserted arbitration expenses (J.S. 8), appellant seeks undeserved sympathy when its own figures could just as well be interpreted as showing that the insurer has benefited from arbitration. Appellant states it has been party to 150 arbitrations, resulting in awards of approximately $105,000 (excluding settlements) plus fees of $16,000 to the American Arbitration Association, and some $10,000 in "other expenses." Thus each award cost it an average of only $700, plus expenses. The expenses ostensibly average out to $248 per case, but are actually much less, for they also include the expenses of settlements, so that the total cost per case in which an award was made was well under $950. Clearly, therefore, appellant's 150

arbitrated claims could not have caused benefits to even approach, on the average, the pre-No-Fault "10/20 coverage"; and the claim of financial harm is not only immaterial, but grossly exaggerated.

The portrayal of "substantial claim losses" because of a claimed potential liability of up to $450,000 per accident (J.S. 12-13) is ludicrous. Appellant's own figures demonstrate that its payments under compulsory arbitration, including awards and expenses, must have been less than $50,000 per year on *all* of its policies, for the three years since No-Fault took effect.

Of the insurer's 12,000 policies which it says came unde. the mandatory extension provisions of the Act, appellant speculates that 1,200 of them would not otherwise have been renewed. Cancellation of those 1,200 policies would not have meant a complete end to the insurer's liability for the alleged bad risks. Those same insureds would have been obliged to obtain coverage under the assigned risk plan, to which the insurer contributes. In addition, appellant would have borne a part of the cost of every other company's rejected risks relegated to assigned risk coverage, N.Y. Insurance Law § 63. Thus, appellant has actually reaped a benefit by not having to share the cost of the impliedly bad risk policies that other companies might have cancelled.

ARGUMENT

The decision of the three-judge court was manifestly correct and presents no substantial question for determination by this Court.

A.

The contract impairment claim, U.S. Const. Art. 1, § 10, stemming from the provisions of §§ 7 and 11 of the Act (N.Y. Laws 1973, c. 13) and N.Y. Insurance Law § 167-a requiring the extension of certain policies, is patently in-

substantial. It received short shrift, and rightly so, at the hands of the three-judge court, J.S. 28a-29a.

It is virtually a truism that the State's right to protect the general welfare of the people by exercise of the police power is paramount to any rights under contract notwithstanding the prohibition in Article 1, § 10, against impairment of the obligations of contracts. *Home Bldg. Loan Assn.* v. *Blaisdell,* 290 U.S. 398 (1934); *Faitoute Co.* v. *Asbury Park,* 316 U.S. 502 (1942); *East New York Savings Bank* v. *Hahn,* 326 U.S. 230 (1945), affg. 293 N.Y. 622; *Manigault* v. *Springs,* 199 U.S. 473 (1905); *Jamaica Savings Bank* v. *Lefkowitz,* 390 F. Supp. 1357 (E.D.N.Y. 1975), aff'd 423 U.S. 802 (1975). The insurance industry is one peculiarly amenable to close state regulation in the exercise of the police power, *e.g., California State Auto Assn.* v. *Maloney,* 341 U.S. 105, 109-10 (1951); *Osborn* v. *Ozlin,* 310 U.S. 53, 65-66 (1940); *Hardware Dealers Mutual F.I. Co.* v. *Glidden Co., supra* (284 U.S. at 157-58), as has been held specifically with regard to no-fault legislation, *Montgomery* v. *Daniels,* 38 N Y 2d 41, 54-6, 340 NE 2d 444, 452, 453 (1975); *Gentile* v. *Altermatt,* 169 Conn. 267, 363 A 2d 1, 18 (1975), app. dism. 423 U.S. 1041 (1976). Indeed, with respect to the insurance industry, the state power is "broad enough to take over the whole business, leaving no part for private enterprise", *Calif. State Auto Assn.* v. *Maloney, supra* (341 U.S. at 110).

As against the exercise of the state police power, coupled with the powerful presumption of constitutionality, the claim of contract impairment simply evaporates.

Considerations such as those indicated in the opinion below (J.S. 28a-29a) support the legislative action in the exercise of the state police power and as a matter of the Legislature's choice and discretion as to the means best adapted to secure the benefits intended. See, *e.g., East New York Savings Bank* v. *Hahn, supra; Home Bldg. & Loan Assn.* v. *Blaisdell, supra.* In the words of the three-judge court which dismissed the instant complaint (J.S. 29a):

> "Regulation of the insurance industry, in order to provide adequate protection of the public, is surely a proper subject for the state's exercise of its police power . . . The law accomplishes a legitimate public goal and any contract right must yield to it."

B.

In attacking the arbitration provisions of N.Y. Insurance Law § 675(2), appellant relies principally on the argument that it is being deprived of a supposed fundamental, independent right "to access to the courts," in violation of the Fourteenth Amendment.

The reliance is misplaced; in the no-fault context, the argument has been rejected not only by the court below, J.S. 22a-23a, but previously by the New York Court of Appeals in a carefully considered opinion, *Montgomery* v. *Daniels, supra,* where it was pointed out that (38 N Y 2d at 60)

> "reliance on *Boddie* v. *Connecticut* (401 U.S. 371) . . . is misplaced. In *Boddie* and in subsequent cases clarifying *Boddie* (e.g., *Ortwein* v. *Schwab,* 410 U.S. 656; *United States* v. *Kras,* 409 U.S. 434) the Supreme Court has made it clear that *access to the courts in and of itself is not an independent constitutional right.* The right to access to the courts will be accorded special constitutional protection only where the right sought to be asserted through such access is a right recognized in the constitutional sense as carrying a preferred status and so entitled to special protection and then only where there is no alternative forum in which vindication of that constitutionality protected right may be sought. . . ." (emphasis supplied.)

So, too, appellant seeks to disinter the long-since abandoned doctrines of *Wolff Packing Co.* v. *Indus. Court,* 262 U.S. 522 (1923) and 267 U.S. 552 (1925), and *Dorchy* v. *Kansas,* 264 U.S. 286 (1924).

As the court below indicated (J.S. 23a), the "public interest" standard of the *Wolff* duo and *Dorchy* "was expressly rejected in *Nebbia* v. *New York,* 291 U.S. 502 (1934)." The Court went on to explain that *Lincoln Fed. Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U.S. 525 (1949), exemplifies the rejection of the substantive due process approach of *Wolff* and *Dorchy* (J.S. 24a).

The New York Court of Appeals had expressed the same view in a compulsory arbitration case, *Mt. St. Mary's Hospital, supra* (26 N Y 2d at 500):

> "The underpinnings for the view [of the *Wolff-Dorchy* cases] concerning industries affected with a public interest have, of course, since then been severely, if not fatally, weakened (see *Lincoln Union* v. *Northwestern Co.,* 335 U.S. 525, 535-37)."

Equally futile is appellant's attempt to maintain that *Hardware Dealers Fire Ins. Co.* v. *Glidden, supra* (284 U.S. 151), has no authoritative application to this case. Although *Hardware Dealers* upheld the constitutionality of a statute which permitted determination by compulsory arbitration only of the amount of loss "reserving all other issues for trial in court" (284 U.S. at 159), the case laid down broad guidelines that would also validate a more comprehensive arbitration scheme (such as provided by the No-Fault Act). Thus, it held that "the state may choose the remedy best adapted to protect the interests concerned . . .," and that "the requirements of the Fourteenth Amendment . . . are satisfied if the substitute is substantial and efficient" (284 U.S. at 158, 159).

In *Montgomery, supra,* the court rejected the argument that New York's No-Fault Act unconstitutionally abro-

gates, in part, the common law right to sue in tort without providing an "adequate substitute remedy," declaring (38 N Y 2d at 58):

> ". . . we would conclude that the issue is not present because under any analysis the law now challenged provides an adequate substitute for the cause of action it abrogates."

CONCLUSION

The appeal should be dismissed or the judgment affirmed.

Dated: New York, New York
May 5, 1977

Respectfully submitted,

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